No. 100.

Supreme Court U.S.
FILED
OCT 30 1901
JAMES H. McKENNEY,
Clerk.

Reply Brf. of Miller v MacVeagh

IN THE

Supreme Court of the United States.

Filed Oct. 30, 1901.

OCTOBER TERM, 1901.

No. 100.

EDWARD P. GALLUP, EXECUTOR OF THE ESTATE OF WILLIAM P. GALLUP, DECEASED,
Plaintiff in Error,

v.

WILLIAM H. SCHMIDT, TREASURER OF MARION COUNTY, INDIANA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

W. H. H. MILLER,
JOHN B. ELAM,
JAMES W. FESLER,
SAMUEL D. MILLER,
Attorneys for Plaintiff in Error.
WAYNE MACVEAGH, *of Counsel.*

The Bollenbeck Press, Indianapolis.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 100.

EDWARD P. GALLUP, EXECUTOR OF THE ESTATE OF WILLIAM P. GALLUP, DECEASED,
Plaintiff in Error,

v.

WILLIAM H. SCHMIDT, TREASURER OF MARION COUNTY,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

We beg to submit a very few words in response to the two briefs filed by William A. Ketcham, special counsel, and William L. Taylor, attorney-general of Indiana.

1. In the statement made by Mr. Ketcham, on page 3, it is said that "on the 4th of January, 1895, being

shortly after the expiration of the year which is allowed for the settlement of decedent's estate under the statute of the state of Indiana, plaintiff in error filed his final report as such executor and caused the same to be set for hearing on January 26, 1895, for final disposition and settlement of said estate." And it is said "The result of which, if approved, would have been to cut off all claims for omitted taxes."

This is an error. Such a settlement, made without attention being called to such a claim, could be readily set aside under section 2558, R. S. 1894, Burns.

Both in Mr. Ketcham's brief and in the brief for the attorney-general, it seems to be made a cause of complaint against the executor that he was prompt in the settlement of the estate. The truth is, that the estate was without debts, and there was no reason for keeping it open longer. If, however, the auditor or any one else had desired to have the estate kept open for the purpose of this claim, it could readily have been accomplished by filing a simple objection to the settlement. The fact that notice had been given for the settlement of the estate is no sufficient reason for filing the claim by the treasurer without waiting for the next term of court or waiting for a time when there was money enough to meet the claim as required by the statute.

2. On page 6 of Mr. Ketcham's brief it is said that "It will not be claimed that the record discloses that decedent did not own the property on account of which the omitted taxes were assessed against him by the auditor."

It is insisted by us that the record does not disclose that he did own it, and it is submitted that in a case of this kind, seeking to increase an assessment, and assuming that a tax-payer has been guilty of

fraud for years, the burden is upon the plaintiff and not the defendant. It is assumed, on the same page, that the fact that the record does not disclose how much the decedent made or lost in trade is sufficient proof that he made or lost nothing, and that his investments were not changed for all the years from 1881 to 1893.

In the statement of facts by the attorney-general, there are a number of things which are not shown by the record, as, on page 3, that the executor was formerly a resident of Indianapolis, and, on page 4, that Gallup entered a full appearance before the auditor, when, as a matter of fact, it does appear, and was found by the court (Finding VIII), that he protested at every step against the jurisdiction of the auditor.

On page 6 it is stated: "The defense is wholly technical. It is not denied that the deceased purposely omitted to report vast sums of property for taxation."

There is no warrant in the record for such a statement. On the contrary, every averment of that kind is denied.

Under Subdivision II of his brief, Mr. Ketcham states, on page 11, that three questions are involved: First, whether the statute is invalid; second, whether it was in the power of the state by its legislation to provide that, for the purpose of taxation, the person in charge of property should be deemed and held to be a resident of the county; and, third, whether, if it was in the power of the state to make such provision by its legislation, it has so provided.

Mr. Ketcham says that if the last two questions are decided in the affirmative, the first is disposed of. We respectfully submit that he has pointed to no statute at all meeting the last or third proposition. If the state has made any provision that a non-resident tax-

payer, whether a trustee, executor or owner in his own right, shall be deemed a resident of the county, Mr. Ketcham would be able to point out the section of the statute making such provision. He has done nothing of the kind. He has quoted a large number of statutes but has not particularized any one that he assumes meets this question, because there is none.

We do not care to say anything as to his discussion under paragraph III, as to the rule of law governing the consideration and determination of constitutional questions, or under paragraph IV as to what is the meaning of due process of law, nor under paragraph V, with reference to what constitutes residence. As to this latter, we submit that as to what is the definition of residence is not material. It is undoubtedly the same in the finding in this case as it is in the statute. The statute, section 8560, as quoted in our original brief, provides, as there shown and as the supreme court of Indiana has held, only for notice to a resident of the county and the finding in this case (Transcript, page 19, last part of Finding VII) is that Edward P. Gallup, as executor of the estate of William P. Gallup, deceased, was then (January 15, 1895), and a long time prior thereto had been and still is a resident of the state of New Hampshire and a non-resident of the state of Indiana, temporarily present at Indianapolis. If the word "reside" or "resident" means the same in the statute that it means in this finding, then this question is foreclosed.

II.

But on pages 25. 26 and 27 of his brief, and under subdivision 6 thereof, Mr. Ketcham tries to show that the case of *Kuntz* v. *Sumption*, 117 Ind. 1, and *Eaton*

v. *The Bank*, 141 Ind. 159, do not apply in this case, and for this purpose he argues that, when the statute says that "if the person claiming to own such property or occupying it or in possession thereof resides in the county and is not present, he shall give such person notice in writing of his intention to add to such property," that that covers notice to everybody that can own taxable property in the county.

In other words, the proposition is that there must be somebody in charge of the property, either as owner, occupant or in possession, and he must be a resident within the county. That is to say, no man can own any personal property in Indiana—a lumber pile, if you please—situated in Steuben county, in the northeast corner of the state, and he, the owner, a resident of Evansville, in the southwest corner of the state, without being in such a sense a resident of Steuben county as that he comes within the purview of this statute. Or, taking intangible property, like credits or promissory notes—a resident of Ohio, Franklin county, if you please—the holder as executor of promissory notes against persons residing in Indiana or elsewhere, belonging to an estate being administered in a county in Indiana, is for purposes of taxation a resident of the latter county. We submit such a proposition does violence to all principles of law hitherto supposed to be applicable to such questions and is its own refutation.

But the attorney-general, Mr. Taylor, says that the case of *Denniston* v. *Terry*, 141 Ind. 677, 679, precludes us from raising this question, because, it is said, it has been waived. The trouble with that citation is that it is not in point. That was a case of an omitted assessment, made by the assessor against a *resident tax-payer*. It appeared that *some* notice was given.

The statute expressly provides for the same notice where the omitted assessment is to be made by the assessor as when made by the auditor. In that case the tax-payer being a resident and some notice being given, it was held that the tax-payer having entered a full appearance and contested the merits, had waived his objection. It was like the case of a man sued under a defective summons or out of his proper county. He could readily waive the question of jurisdiction, and if he appeared and contested the merits without making the question in proper form, he would do so. But that rule has no application where the statute, as in the case at bar, provides for *no* notice. The statute here under discussion as to non-residents provides for no notice. It is in that respect exactly like the statute in the Kuntz-Sumption and the Eaton cases. Indeed in the Eaton case there was a *verbal* notice to the cashier of the bank to appear and answer, but inasmuch as the statute provided for no notice, although he did appear and although he was examined as a witness, as was done also in the Kuntz case, it was held that he was not precluded from asserting that the statute was invalid.

So in the Bowen case, 138 Ind. 434, and every other of the cases cited where an adjudication has been made at all touching this general question, the tax-payer was a resident and the question here at issue was not presented.

III.

In the brief of the attorney-general, much space is given to showing that the plaintiff in error made a full appearance in the circuit court. As the question here is a question of the jurisdiction of the *auditor*,

and not of the circuit court, we do not care to discuss this matter.

The attorney-general also, with great emphasis, over and over, repeats that we have abandoned several questions that we made and insisted upon in the state court, apparently being unaware that no question except the federal question, or something bearing directly thereon, will be considered in this court. We only wish that we could present to this court, and have decided, some of the questions presented to the state court, as for instance, that when the statute of the state said this claim should be filed by the treasurer at the *next term* of court, it did not mean the very day after the assessment and at the same term; and when it said that it should only be filed when there was shown to be *money* enough in the hands of the executor to pay the taxes, it did not mean that it could be filed *instanter*, notwithstanding the complaint showed that there was not money enough on hand for that purpose; or that notwithstanding the supreme court of Indiana says that we had ample opportunity to contest this matter by injunction, as a matter of fact, the claim was filed by the treasurer in this action the very day after the assessment was made, without giving the executor any time to prepare, or file a bill for an injunction. As said in our original brief, we think these matters do throw light upon the manner in which the main federal question here was disposed of.

The attorney-general also says that the general policy of the Indiana statutes is to appoint only residents, administrators and executors. As shown in our original brief this is not only a mistake, but the statutes expressly provide that non-residents may be appointed and may serve in those capacities. And this we say, notwithstanding the alleged dictum of Henry's Pro-

bate Law which, it is said, is the leading authority in Indiana upon this question, but which we are compelled to say we never heard of until we saw it in this citation.

It is also said that it has been adjudged by this court that if a party has an opportunity to enjoin a tax, the assessment thereof is due process of law, although it is made without notice. To this proposition *McMillan* v. *Anderson*, 95 U. S. 37, is cited. But that was in a case where the *statute expressly provided* for the proceeding by injunction; and it is submitted that, in the absence of such a provision in the statute, the making of an omitted assessment without notice would not be due process of law; and so it has been expressly adjudged in the cases cited in our original brief.

Kuntz v. *Sumption* and others, as well as federal cases there cited.

The attorney-general also argues that the residence of the executor must be the residence of the estate because, he says, no one has any right in the estate until after distribution. In this also the attorney-general is in error. The executor of an estate is for all the purposes of taxation and every other proceeding the owner of the estate. He has the legal title, as is shown by the cases cited in our original brief, and as has been repeatedly adjudged by this court.

The attorney-general says that the provision for levy and sale of property of a decedent for taxes is illegal. We submit the manner of collecting such taxes is wholly with the legislature. If it chooses to have the same collected by distress and sale it may do so, notwithstanding the estate may be pending in the probate court. Moreover the statute makes the same a lien and this can not be done without notice.

He also says (page 11) that "all personal property of residents and non-residents in Indiana is assessed to some resident trustee, guardian, administrator or custodian thereof in the state,"—a palpable mistake, especially as to choses in action

The attorney-general says "it is not necessary to notify non-residents of proposed assessments of personal property for omitted taxes." The supreme court concedes that such notice is necessary and invests "official residence" to meet the requirement. That court also concedes that the question is squarely presented in this case and decides it.

The statute cited by Mr. Ketcham on pages 42 and 43 of his brief signify nothing here. If they furnish the only remedy then all the decisions granting injunctions against illegal taxes are wrong.

Again, it is said, and repeated over and over in the brief of the attorney-general, that an executor is bound to appear in the court at any time without notice to any claim. To this we answer that precisely the reverse is the rule. Exactly the reverse has been adjudged by the supreme court of Indiana in the case of *Scott* v. *Dailey*, 89 Ind. 477, where it is held that the probate court can get no jurisdiction of a claim except it goes first upon the appearance or claim docket, and thence, after the lapse of the time prescribed, upon the trial docket.

The entire argument in the case at bar, both of the court and counsel, to the effect that we were not aggrieved because we were bound to appear and answer this claim as a claim against the estate, entirely ignores this statute, as it also ignores the requirements of statute 8587, that the proceeding shall only be commenced at the next term, and only when there

is money enough in the hands of the executor to pay the claim.

The manner in which these several statutes are ignored, and the manner in which it is admitted this claim was made up by the auditor, by simply taking the amount returned by the executor for 1893 and deducting five per cent. for each year back to 1881, indicate the stress of the occasion.

The executor, having been appointed, immediately proceeded to and did make a fair return, as it is conceded, of all the property of the estate for taxation. He knew with reference to the estate just what he found when he came to make the inventory, no more and no less. Having made a fair return of just what he found, he is here charged with disregard of the decencies of life, and with a disposition himself to do wrong, because he would not *admit* these enormous wrongs charged against his brother. It is assumed that he ought at once, without knowing the condition of things at all, to have acceded to every charge that was made, and paid every demand that was made upon him. We submit that this was not called for, either by his duty to the public, to his brother's estate, to the memory of his brother, or to himself.

Respectfully,

W. H. H. Miller,
Attorney for Plaintiff in Error.

Wayne MacVeagh,
of Counsel.